

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7527

Petition of Telephone Operating Company of Vermont)
LLC, d/b/a FairPoint Communications, for a Certificate)
of Public Good, under 30 V.S.A. §248a, authorizing the)
construction of broadband telecommunications facilities)
in Essex and Milton, Vermont

Order entered: 9/18/2009

ORDER RE: MOTION FOR INTERLOCUTORY REVIEW

I. Introduction

In this Order the Vermont Public Service Board ("Board") grants the Meadows Edge Bixby Hill Homeowner's Association ("BHA") request for interlocutory review, and affirms in part and reverses in part the Hearing Officer's Order of August 27, 2009.

II. Background

On August 27, 2009, the Hearing Officer issued an Order granting BHA permissive intervention with respect to the aesthetic impact of the proposed project on the Meadows Edge housing development, located in Essex, Vermont.

On September 2, 2009, BHA filed a motion for interlocutory review of the Hearing Officer's decision regarding BHA's intervention on the grounds that the Order improperly limited BHA's intervention.

On September 9, 2009, Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications ("FairPoint"), filed a memorandum in opposition to BHA's motion for interlocutory review.

III. Discussion and Conclusion

In the August 27, 2009, Order regarding intervention, the Hearing Officer concluded that BHA had demonstrated a particularized interest in aesthetic impacts in the Meadows Edge development and, accordingly, granted permissive intervention with respect to that interest.¹ The Hearing Officer further concluded that, with respect to the other grounds of intervention raised, BHA had shown only generalized concerns that could be adequately addressed by other parties in the proceeding.

BHA argues that permissive intervention cannot be limited to "certain distinct aspects of a statutory criterion that they clearly have a particularized interest in."² Specifically, BHA argues that due to the nature of the Quechee test that the Board applies in analyzing aesthetic impacts, that "analysis cannot be limited to the affects of a project on only a specific site" and BHA should not be limited to discussing aesthetic impacts of the project on the Meadows Edge development. BHA further claims that Board precedent would allow BHA to participate fully on aesthetic issues once it has shown a clear particularized interest in the aesthetic impacts. BHA contends that because some of its members live outside the Meadows Edge development that the scope of intervention should be broadened to include all of its members.

BHA also asserts that even if its intervention on aesthetic issues is limited to the impacts on its members' properties, "its members include homeowners living on Bixby Hill Road as well as the Meadows Edge development," and therefore its intervention should be expanded to address aesthetic impacts on Bixby Hill Road.

BHA next claims that it should also be granted intervention with respect to 30 V.S.A. § 248a(d), because the project will not be in harmony with a town subdivision permit issued for the project area.

BHA also contends that it should be granted intervention with respect to 30 V.S.A. § 248a(c)(2), noting that it referred to that statutory provision in comments that it filed on August 18, 2009,³ and that "[t]he Association has a particularized interest regarding this issue, as they participated in every meeting before the [Essex] Planning Commission, and the

1. *Prehearing Conference Memorandum and Order Re Intervention*, 8/27/09, at 3.

2. *Motion for Interlocutory Review*, at 1.

3. BHA's August 18 comments were in response to FairPoint's objections to BHA's intervention request.

recommendations of the Planning Commission specifically incorporated by reference the arguments made by the undersigned counsel" regarding compliance.⁴

Finally, BHA argues that "several owners of historic properties" outside the Meadows Edge development have joined the association and, therefore, it should be granted intervention with respect to the project's impacts on historic sites.

FairPoint argues that BHA's request to participate on all issues related to aesthetics should be denied. FairPoint argues that it is appropriate for the Board to "explicitly limit the scope of intervention to specific, demonstrated interests, rather than any possible issue that may arise under an identified statutory criterion."⁵ FairPoint contends that BHA has not demonstrated "a particularized interest in the project's aesthetic impact on all areas of Essex and Milton" and is not entitled to participate on all aspects of aesthetics "no matter how remotely related to the Meadows Edge subdivision."⁶ FairPoint also argues that BHA has failed to identify or provide sufficient other information to adequately assess aesthetic impacts on its members outside the Meadows Edge development. FairPoint contends that BHA's interests in historic sites, the town plan, and subdivision permits, are no more than "generalized aesthetics claims."⁷ Finally, FairPoint argues that BHA has failed to explain why the aesthetic analysis conducted by the Department of Public Service ("Department") cannot adequately address the aesthetic impacts of the project in other areas of the town.

Ordinarily, the Board looks with disfavor upon granting interlocutory review and does not typically grant these requests. However, in the instant case, where the issues appear to be rather straightforward and given the statutorily limited time frame for this docket, addressing the issues raised by this request may lead to a more expeditious and efficient resolution of this Docket. Therefore, the Board grants BHA's request that we conduct an interlocutory review of the Hearing Officer's Order.

The Hearing Officer granted BHA permissive intervention under Board Rule 2.209(B), which provides that :

4. *Id.* at 3-4.

5. *Response to Motion for Interlocutory Review*, at 2.

6. *Id.*

7. *Id.* at 4.

Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

Board Rule 2.209(C) further provides that:

Where a party has been granted intervention, the Board may restrict such party's participation to only those issues in which the party has demonstrated an interest, may require such party to join with other parties with respect to appearance by counsel, presentation of evidence or other matters, or may otherwise limit such party's participation, all as the interests of justice and economy of adjudication require.

BHA's motion to intervene and its subsequent filings do not demonstrate that BHA, as an organization, has a substantial and particularized interest in aesthetic impacts beyond the Meadows Edge/Bixby Hill area.⁸ Furthermore, even if BHA had shown such an interest, we agree with the Hearing Officer that BHA has not shown that such a broader interest in aesthetic impacts would not be adequately protected by other parties, particularly the Department.

BHA's recruitment of unspecified members from outside the development does not, by itself, change the interests of BHA as an organization. BHA has not demonstrated that it (as distinct from some of its members) has a particularized interest in aesthetic impacts in areas outside the Meadows Edge/Bixby Hill development. We conclude that the generalized concerns of landowners in other areas can be adequately addressed through the aesthetic analysis performed by the Department, and that BHA's grant of permissive intervention should not be expanded to include such broader aesthetic impacts.

We are not persuaded by BHA's arguments that the Quechee test and Board precedent call for full participation on all aesthetic issues by any intervenor that can show a substantial interest in a localized aesthetic impact. First, Board Rule 2.209(C) expressly provides that the Board

8. See, e.g., Docket No. 7156, *Petition of UPC Vermont Wind*, Order of 4/27/06 (allowing intervention of citizens' group on those issues for which it demonstrated an interest as an organization and denying the group intervention on other issues for which it failed to demonstrate such an interest); Docket No. 7508, *Petition of Georgia Mountain Community Wind*, Orders of 7/2/09 and 8/3/09 (denying intervention of citizens' group because it failed to provide information describing the organization's purposes and interests).

may limit an intervenor's "participation to only those issues in which the party has demonstrated an interest"

Second, contrary to BHA's claims, Board precedent fully supports restricting intervenors' participation to the interests that they have demonstrated.⁹ In fact, BHA attempts to portray a prior Board decision as meaning the opposite of what it explicitly states. In its August 19, 2009, filing, BHA states that in an order issued on July 2, 2009, in Docket No. 7508:

The Board limited the intervention of those parties [several adjoining landowners] to "the interests that they have identified in their motion," meaning the statutory criteria they showed a particularized interest in, with no indication that they would be further limited in the manner FairPoint has proposed in this matter.¹⁰

Such an attempted reading of the Board's Order in Docket No. 7508 flies in the face of its plain language, which expressly limits the intervenors' participation to their demonstrated *interests* and not, as BHA would have us believe, to the broader statutory criteria to which those interests relate.

Third, in prior cases when the Board has limited parties' intervention on aesthetic issues to the impacts on their own properties, there have been no consequential difficulties in applying the Quechee test. There is nothing in the Quechee test that requires all proffered evidence thereunder to address comprehensively the full geographic scope of a project's potential aesthetic impacts.

We do agree with BHA that its intervention on aesthetic issues should be expanded to include potential aesthetic impacts on the Bixby Hill residences. However, we do not fault the Hearing Officer for limiting BHA's intervention on aesthetic issues to the Meadows Edge development, given that in its motion to intervene BHA stated that "[t]he Association consists of over 100 voters or real property owners residing in the Meadows Edge/Bixby Hill development located in Essex, Vermont,"¹¹ thereby indicating that its members reside in a single development. In its Motion for interlocutory review, BHA clarified that its members do not in fact all live in the one development, stating that instead:

9. See, e.g., Docket No. 7508, *Petition of Georgia Mountain Community Wind*, Order of 7/2/09.

10. BHA August 19, 2009, Comments at 5.

11. BHA Motion to Intervene at 2.

The Association, however, is not comprised solely of residents of Meadows Edge; rather it is the Meadow's Edge Bixby Hill Homeowner's Association, and its members include homeowners living on Bixby Hill Road as well as the Meadows Edge development (it also includes owners of historic sites outside Meadows Edge – see below).¹²

Based on this clarification, we conclude that BHA's intervention should be expanded to include aesthetic impacts on residences on Bixby Hill Road.

With respect to BHA's request to intervene on impacts on historic properties, we reach the same conclusion as with its request to participate on aesthetic impacts beyond the Meadows Edge/Bixby Hill area. BHA has failed to demonstrate that it has a substantial and particularized interest in impacts on historic properties, and its addition of new members who may have such an interest does not by itself change BHA's interests. We also observe that those new members appear to have been recruited by BHA subsequent to its motion to intervene, given that BHA submitted the list of those new members well after filing its intervention motion. Furthermore, those members' interests in the historic properties is not clear from BHA's filing.¹³

With respect to BHA's request to intervene pursuant to Section 248a(d), we conclude that there is no basis for expanding BHA's intervention, and that instead it may raise relevant issues under Section 248a(d) to the extent these issues are within the existing scope of its intervention. Pursuant to Section 248a(d):

When issuing a certificate of public good under this section, the board shall give due consideration to all conditions in an existing state or local permit and shall harmonize the conditions in the certificate of public good with the existing permit conditions to the extent feasible.

BHA has not shown any additional particularized interest cognizable under § 248a(d) that would broaden the scope of its intervention. To the extent that there are any existing state or local permits that are applicable under Section 248a(d), BHA may address such permits provided that they are related to the interests for which BHA has been granted intervention, namely, aesthetic impacts on the Meadows Edge development and Bixby Hill residences.

12. BHA Motion for Reconsideration and Clarification at 2.

13. In its request for interlocutory review, BHA states that "[t]he *owners* of the historic properties signed the petition, joining with the Association," BHA Motion for Reconsideration and Clarification at 4 (emphasis added). However, the petition itself refers to the signatories as "*residents* of historical properties," and it appears that at least nine of the fourteen signatories reside in apartments, raising doubts as to the extent to which the owners of the properties were signatories. BHA August 19 Comments at Exh. 3.

Finally, with respect to BHA's request to expand its intervention to include Section 248a(c)(2), we note that BHA's motion to intervene did not specifically request intervention under that section.¹⁴ Its motion did, however, state that:

The members of the Association are further concerned that the Tower will be visible from several historic landmarks and designated scenic resources within Essex, and will thus degrade the rural character of the area in violation of the Town Plan.¹⁵

We conclude that, while not a particularly clear statement of a request to intervene with respect to Section 248a(c)(2), it is sufficient for us to conclude that BHA raised the issue in its original motion. We also note that neither the Town of Essex nor its Planning Commission have intervened (although the Planning Commission filed comments on July 6, 2009, opposing the proposed project). We thus conclude that, due to the likely substantial overlap of issues under Section 248a(c)(2) with the aesthetic impacts on the Meadows Edge/Bixby Hill area, and the apparent lack of another party to protect BHA's interest here, it is efficient and sensible to allow BHA to participate with respect to Section 248a(c)(2).

This matter is returned to the Hearing Officer.

SO ORDERED.

14. In its motion for interlocutory review, BHA contends that "the Association has brought forth concerns regarding 30 V.S.A. § 248a(c)(2)," referring to a statement in BHA's August 19 Comments. However, the August 19 Comments only cite Section 248a(c)(2) in a footnote within a paragraph discussing Section 248a(d), and those Comments – as with BHA's motion to intervene – do not request intervention with respect to Section 248a(c)(2). BHA August 19 Comments at 6 n. 8.

15. BHA Motion to Intervene at 2.

DATED at Montpelier, Vermont, this 18th day of September, 2009.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: September 18, 2009

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any technical errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us).